No. 02-56

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH M. DeMAURO,

Petitioner,

v.

ANNETTE B. DeMAURO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Hampshire

REPLY BRIEF

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ARGUMENT

The Respondent, Annette B. DeMauro ("Ms. DeMauro"), does not dispute that the Fifth Amendment and the Fourteenth Amendment should trump New Hampshire's newly articulated civil appellate forfeiture rule; rather Ms. DeMauro recasts the facts and the proceedings below as a basis for depriving the Petitioner, and future similarly situated appellants, their guaranteed constitutional rights. In so doing Ms. DeMauro misleads this Court.

The New Hampshire Supreme Court ("N.H. Sup.Ct.") dismissed the appeal of the Petitioner, Joseph M. DeMauro ("DeMauro"), which raised constitutional issues under the Fifth and Fourteenth Amendments, prior to considering those constitutional issues. Appendix to Petition at 1 ("A."). Ms. DeMauro concedes that if, as claimed, DeMauro was denied due process at trial, he is constitutionally entitled to appellate review. *See*, Opposition at Page 12 ("Opp.12"). Ms. DeMauro contends, however, that dismissal of DeMauro's appeal was proper because he was afforded due process by the New Hampshire trial court ("the trial court"). In fact, Ms. DeMauro's Opposition neither addresses the issues raised by DeMauro in his Petition for Writ of Certiorari ("Petition") nor the ruling in *National Union of Maritime Cooks & Stewards v. Arnold,* 348 U.S. 37, 75 S.Ct. 92 (1954), whereby this Court determined that appellate forfeiture based upon the contempt of an appellant may be proper where the appeal did ***not*** raise constitutional issues of due process or equal protection. *See, National Union of Maritime Cooks & Stewards v. Arnold,* 348 U.S. 37, 75 S.Ct. 92 (1954) (emphasis supplied). Ms. DeMauro presents a confusing set of factual assertions resting upon the predicate error that DeMauro was afforded due process at trial as a basis

for her Opposition to his Petition and then seeks to demonstrate that DeMauro is unworthy of the constitutional protections of due process and rights against self-incrimination.

DeMauro need not win a popularity contest to be entitled to the protections afforded by the Fifth and Fourteenth Amendments. U.S.C.A. Const. Amends. 5 and 14; *see e.g., Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967) (lawyer facing disbarment for financial misdealing afforded rights). In *Spevak,* this Court flatly rejected the notion that the Fifth Amendment applies only to certain classes or persons, stating, "[w]e find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." 385 U.S. at 516, 87 S.Ct. at 628-29. Further, claims by Ms. DeMauro that there was some admissible evidence presented at trial, which would have justified dismissal of the appeal, are irrelevant. Opp.16, *et seq*. The critical question is not whether or not there was some admissible evidence offered by Ms. DeMauro; the trial court punished DeMauro by allowing any and all facts and evidence (admissible and inadmissible) offered against DeMauro because DeMauro had asserted his privilege against self-incrimination and that punishment violated due process and was an improper sanction under the Fifth Amendment. U.S.C.A. Const. Amends. 5 and 14.

More specifically, the Opposition errs as follows:

A. Ms. DeMauro improperly narrows the concept of due process so that it does *not* include the right to be heard by a fair, impartial trial judge.

Ms. DeMauro offers a myopic definition of due process, saying it is only the "right to be heard, to present evidence and to cross examine witnesses." *See*, Opp.12, citing *Goldberg v. Kelly*, 397 U.S. 254, 260, 90 S.Ct.1011, 1018 (1970). Due process, however, encompasses many

concepts and is the "primary and indispensable foundation of individual freedom." *In re Gault*, 387 U.S. 1, 19-21, 87 S.Ct. 1428 (1967). At minimum, due process requires a meaningful hearing before a judge that harbors neither bias toward a litigant nor a predisposition as to the outcome. *See*, *Bracy v. Gramley,* 520 U.S. 899, 117 S.Ct. 1793 (1997). While Ms. DeMauro tries to distinguish *Bracy*, there is no legal authority supporting the notion that actions of the trial court in this case, ignoring N.H. Sup.Ct. orders and trampling DeMauro's fundamental rights to due process and against self-incrimination, are any less egregious than the judicial financial misdealing in *Bracy*. Both wrongly influenced the outcome of a proceeding by denying due process. Opp.19.

Also, Ms. DeMauro's references to the number of attorneys representing DeMauro at trial is a "red herring." The trial court was the arbiter of whether DeMauro would be afforded his constitutional rights. *Id.* Whether four or forty lawyers argued on his behalf[1] is not a marker of due process. *Cf.* Opp.12, *et seq*.

B. Ms. DeMauro seeks to mislead the Court with documents in her Lodging of Exhibits.

1. Pleadings or orders from matters now pending in the Commonwealth of Massachusetts are irrelevant to the instant Petition and of no assistance to the Court in determining whether the N.H. trial court violated DeMauro's Fifth and Fourteenth Amendment rights or

[1] Ms. DeMauro was represented by attorneys from two law firms, as was DeMauro. *See e.g.*, A. 90; L-85. Each party had engaged local New Hampshire counsel for the N.H. divorce and were joined by Massachusetts counsel who represented the parties in the prior pending RICO action in the District of Massachusetts and the still pending Massachusetts state court action, with the undersigned and Mr. Dwork at the same firm until 1999. *See e.g.*, A. 14; L-42.

whether the N.H. Sup.Ct.'s new civil appellate forfeiture rule passes constitutional muster. DeMauro's rights under the Fifth Amendment were resolved in *DeMauro v. DeMauro*, 142 N.H. 879, 712 A.2d 623 (1998) ("*DeMauro I*"), which is the only ruling that merits consideration by this Court on the issue. More specifically:

a. Lodging of Exhibits ("L-__") pages 41 and 42 relate to a Massachusetts Superior Court's issuance of a *capias* (but not a finding of contempt), in a September 2001 proceeding. *See e.g.*, Mass. R.Civ. P. 37.P[2] Neither the trial court nor the N.H. Sup.Ct. considered those documents and they are irrelevant to the constitutionality of the dismissal of DeMauro's appeal.

b. References to DeMauro's assertion of privilege against self-incrimination in another proceeding conducted in a foreign jurisdiction are irrelevant to this Petition. *See* Opp.25; L-77-84 and L-43-45. In fact, the interlocutory order in Massachusetts which deferred a final ruling on DeMauro's rights under the Fifth Amendment logically noted that "there may be some merit to his claim that it is not his obligation to specify the crimes for which he fears prosecution" L-44. *See* Massachusetts G.L.c. 231, Sec. 118 Par. 1.[3]; *Cf.* Opp. 25; *see also*, *Hoffman v. U.S.*, 341 U.S. 479, 486, 71 S.Ct. 841, 818 (1951).[4]

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[2] Rule 37 of the Massachusetts Rules of Civil Procedure addresses discovery sanctions. Supplemental Appendix at 3 ("Supp. A").

[3] Massachusetts allows appeals from discovery orders which, while rarely granted, are interlocutory and upon denial of same the issue remains preserved for appeal following final judgment. Massachusetts G.L.c. 231 Sec. 118 Supp. A 1.

[4] ("[I]f the witness upon interposing his claim were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection from which the privilege is designed to guarantee. To sustain the privilege it need only be evident from the implication of the question in the settling in which it is asked, that [a response might be

(Continued on following page)

c. Many of the documents included in Ms. DeMauro's Lodging are, and were at the time of trial and dismissal of the appeal, unverified, uncertified hearsay, not within any exception. Some financial documents purportedly date back to 1978, the acceptance of which was challenged by DeMauro and the subject of his appeal.[5] Opp.2; L-4,5,6,7,8, *et seq*. *Cf*., DeMauro's Petition /4,10, 17, 18.

C. Describing DeMauro as a "fugitive" in the context of the trial court's issuance of a civil *capias* is improper and misleading.

By definition, a fugitive is: "One who flees; used in criminal law with the implication of flight, evasion, or escape from arrest, prosecution or incarceration." Black's Law Dictionary 671 (6th ed. 1990); *See also*, A. 98; A. 70-71; L-38,41. Based upon the existence of a civil *capias* however, Ms. DeMauro leads her Opposition with the statement that "DeMauro is a fugitive from the New Hampshire court system." Opp.1. She continues to make frequent references to DeMauro's alleged status as a fugitive throughout her Opposition.[6] In so doing, Ms. DeMauro improperly raises the issue of "fugitive disentitlement" in an effort to rely upon cases inapt under the present circumstances. *See e.g.,* Opp.22.

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dangerous]." *Hoffman v. U.S.*, 341 U.S. 479, 486-87, 71 S.Ct. 814, 818 (1951).

[5] Ms. DeMauro, her financial expert and the receiver were the only witnesses at trial. Ms. DeMauro did not have any witness competent to authenticate any document she sought to admit and which the court accepted on the grounds that DeMauro had not provided discovery or testimony on his affairs. *See,* Petition, *passim*.

[6] During discovery the N.H. trial court issued a civil *capias* in response to DeMauro's failure to pay support. A.72. In the Decree, the court entered an order that would renew the prior *capias* for sums accrued prior to trial was outstanding. A. 98.

D. Ms. DeMauro misstates the documentary and testimonial evidence in the record.

1. Ms. DeMauro claims that the report of her financial expert was not altered in response to her attorney's request. Opp.2, *et seq*. The trial transcript however reflects otherwise noting that Ms. DeMauro's expert created a subsequent report, which differed from his first report in response to speaking with Ms. DeMauro's counsel. "In a phone conversation with [plaintiff's counsel] we talked about making these projections more conservative. Supp. A. 9. "[Plaintiff's counsel] asked me to really prepare two worksheets." A second Extrapolation was created in response to Ms. DeMauro's trial counsel which the court accepted into evidence. A. 88, 89.[7]

2. Regarding payment of support and contempt:

a. DeMauro relies upon his Petition and those portions of the record duplicated in the Appendix attached thereto to demonstrate that he was not in contempt when his appeal was dismissed, or; alternatively, that any outstanding order of contempt for failing to pay spousal support had been satisfied. Petition at 13, *et seq*. *See*, A. 72 (DeMauro was not held in contempt for failing to execute financial releases).

b. The Court should ignore Ms. DeMauro's claim that the $400,000.00 paid to her from the proceeds from the sale of the Florida property during the pendency of the appeal, which DeMauro contends satisfied an outstanding arrearage, were her own funds and that no portion of the payment belonged or should be attributed to DeMauro. Opp.5. The issue was addressed at length in the Petition. *See also*, A. 96, 98, 68-63. The Decree valued the property at Four Million Dollars ($4,000,000.00). A. 107. Upon its

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[7] Upon request of this Court, or acceptance of the Petition, DeMauro will provide a complete trial transcript.

sale pursuant to a trial court order (A. 63), DeMauro's equitable right to a ½ interest in the proceeds would have been more than sufficient to satisfy the amounts owed to Ms. DeMauro from funds not her own, had the trial court not awarded her 300% of the identified estate assets. The order allowing the sale of the property and the payment to Ms. DeMauro deferred ruling on whether that payment satisfied support obligations or was a property distribution until entry of final judgment. A. 64.

c. A claimed arrearage of One Million Dollars arising after dismissal of the appeal is irrelevant. Opp.26. These claims have not been adjudicated and were not considered by the courts below. U.S.C.A. Const. Amend. 14. Further, due process and rights against self-incrimination are afforded in the context of a divorce and collateral RICO claim as well in a criminal prosecution or before a grand jury, so scandalous allegations lack merit.

3. Ms. DeMauro misrepresents that the releases signed by the receiver were inadequate. Opp.4. Actually, the receiver testified that he did get responses to his inquiries although apparently he did not find assets to satisfy Ms. DeMauro's expectations. Supp. A. 11. Moreover, the receiver delivered the releases to Ms. DeMauro's trial counsel who undertook to make inquiries directly. Supp. A. 10-11. Ms. DeMauro does not consider whether (i) there were no assets held by entities contacted or (ii) the releases were not honored because the receiver gave the release to Ms. DeMauro's attorney to make direct inquiries. Supp. A. 11. At least one responding entity took offense at a belligerent cover letter sent by her trial counsel although the entity confirmed steps to be taken to obtain information. L-27 (Ms. DeMauro's counsel told to "obtain prior judicial recognition of such US order . . . to enable us to lift banking secrecy.") Further, a release prepared pursuant to *Doe v. United States*, 487 U.S. 201, 108 S.Ct. 2341 (1988) may require entities to provide information respecting current assets, not historical records, to the extent any existed. A. 74. It is unclear if Ms. DeMauro's

trial counsel's threatening letter rendered the enclosed release non-compliant with *Doe* because counsel's letter merged with the enclosed release. L-27. *Doe v. United States*, 487 U.S. 201, 108 S.Ct. 2341 (1988).

4. There is a "logical nexus" between DeMauro's assertion of privilege prior to trial and his appeal from a denial of due process at trial. *Cf.* Opp.12. The N.H. Sup.Ct., in *Douglas v. Douglas,* 143 N.H. 419, 427, 728 A.2d 215, 220 (1999), held that the failure to appear at trial may result in a default, but *Douglas* does not provide for further sanctions or otherwise relieve a plaintiff of her burden of production or persuasion on the issue of damages. *Douglas v. Douglas,* 143 N.H. 419, 427, 728 A.2d 215, 220 (1999). At the time the trial court entered the default order it had been instructed on remand in *DeMauro I,* that DeMauro had properly asserted his privileges against self-incrimination throughout discovery and was relieved of providing any information regarding his financial status. *See*, *DeMauro I*. Upon entry of default, the only remaining triable issue was DeMauro's financial status because the default admitted all but financial matters. Therefore, the trial court and Ms. DeMauro were on notice that DeMauro could offer no testimony at trial, notwithstanding Ms. DeMauro's claim here that DeMauro could have been expected to testify on non-financial issues. Opp.21. The trial court's belief, articulated for the first time in the Decree, that DeMauro's privileged silence was contemptuous (A. 92), confirms that the denial of due process at trial is linked inexorably to DeMauro's prior assertion of Fifth Amendment rights. Default entry should have defused the trial court's (misplaced) anger at DeMauro regarding his Fifth Amendment rights, but appears to have heightened it.

5. Ms. DeMauro claims "no new rule was fashioned" and recycles law that is inapplicable to an appeal which raises constitutional issues. Opp.11. The N.H. Sup.Ct.'s decision clearly states otherwise. A. 7.

6. Ms. DeMauro incorrectly claims that DeMauro failed to raise evidentiary issues on appeal. Opp.13. The

Notice of Appeal raised questions that addressed the trial court's disregard for the rules of evidence and the resulting due process violation that was fully briefed upon acceptance of the appeal. A. 77; *See* N.H. Sup.Ct. Rule 16(3)(b). A. 56. DeMauro clearly demonstrated that his appeal rested on the trial court's improper acceptance of evidence based on DeMauro's claims of privilege against self-incrimination. Rather than finding that there was no need to question the trial court judge's rulings on the evidence, the N.H. Sup.Ct. refused to reach the question, going to great lengths to fashion a new rule that dismissed the appeal and avoided addressing the trial court's violation of DeMauro's constitutional rights. A. 7; Petition/14. Other factual and procedural differences between the parties, including why and when DeMauro asserted his Fifth Amendment rights, are resolved by review of the record including but not limited to *DeMauro I*.

7. Ms. DeMauro also argues that raw financial data she provided to her financial expert (without the benefit of supporting documentation), and which he adopted in the Extrapolations at Exhibits 83-85 (A. 88, 89), is blessed with reliability pursuant to New Hampshire Rule of Evidence 703. Opp.16-18. *Cf.* Petition, *passim*. She claims that her expert's testimony and documents were proper under that rule because "[the information relied upon to create the reports] was the type normally relied on in the profession." Opp.16. But fatal to Ms. DeMauro's claim is that the expert's testimony respecting her financial data is merely the "recitation of a statement made to him by another." *Brown v. Bonnin*, 132 N.H. 488, 493, 566 A.2d 1149, 1152 (1989). As confirmed in *Brown*,

> " 'Expert witnesses are called to give their opinions on subjects about which they have special knowledge and experience, upon the assumption that, by reason of these qualifications, they will be able to assist the jury in its search for the truth.' While the expert may rely on hearsay to form an expert opinion, 'the basis for [the] conclusion is assumed to lie in his [or her] special

> knowledge of such matters. . . .' An expert witness is allowed to base expert opinion on hearsay only because it is assumed that the witness uses his or her 'special knowledge' and expertise to evaluate the hearsay."

132 N.H. at 493, 566 A.2d at 1152-53 (*quoting*, *Bill v. Company*, 90 N.H. 453, 456, 10 A.2d 662, 663-64 (1940).

The financial expert had no special knowledge as to the earnings or expenditures of the DeMauros and conceded he could only verify his methodology in computing hypothetical present value of alleged historical holdings, but not Ms. DeMauro's data, which his computation relied upon. He had no information respecting taxes, domestic or foreign, or whether funds were income, and his most recent data was from 1991. Further Ms. DeMauro's criticism of DeMauro for failing to call a competing expert to refute the irrelevance of her expert's hypothetical valuation is simply erroneous. It does not require an expert for the finder to know that the figures were unreliable when the expert would vouch only for his methodology.

CONCLUSION

The Opposition maligns DeMauro and disparages his counsel but does not refute the grounds for this Petition, which seeks a Writ of Certiorari to correct a new state appellate forfeiture rule that allows violations of federal constitutional rights and raises the risk of future equal protection claims in its application.

Respectfully submitted,

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Massachusetts General Laws c. 231

§ 118. Temporary appellate relief from interlocutory orders; appeals to appeals court or supreme judicial court

A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department may file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen. If the petition is filed with respect to a discovery order and is denied, the single justice may, after such hearing as the single justice in his discretion deems appropriate, require the petitioning party or the attorney advising the petition [sic] or both of them to pay to the party who opposed the petition the reasonable expenses incurred in opposing the petition, including attorney's fees, unless the court finds that the filing of the petition was substantially justified or that other circumstances make an award of expenses unjust.

A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department, granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction, or a party aggrieved by an interlocutory order of a single justice of the appellate court granting a petition for relief from such an order, may appeal therefrom to the appeals court or, subject to the provisions of section ten of

chapter two hundred and eleven A, to the supreme judicial court, which shall affirm, modify, vacate, set aside, reverse the order or remand the cause and direct the entry of such appropriate order as may be just under the circumstances. An appeal under this paragraph shall be taken within thirty days of the date of the entry of the interlocutory order and in accordance with the Massachusetts rules of appellate procedure. Pursuant to action taken by the appellate court the cause shall be remanded to the trial court for further proceedings.

The filing of a petition hereunder shall not suspend the execution of the order which is the subject of the petition, except as otherwise ordered by a single justice of the appellate court.

Massachusetts Rules of Civil Procedure Rule 37
(Failure To Make Discovery: Sanctions)

(a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county or judicial district, as the case may be, where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county or judicial district, as the case may be, where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or a designation or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court in County or District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or judicial district, as the case may be, in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party

failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court may require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable grounds to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(b)(6) or Rule 31(a) to testify on behalf of a party wilfully fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the

request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court may require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Expenses Against Commonwealth. Except to the extent permitted by statute, expenses and fees may not be awarded against the Commonwealth under this rule.

STATE OF NEW HAMPSHIRE

ROCKINGHAM, ss. SUPERIOR COURT TERM NOVEMBER 1999

****

ANNETTE DEMAURO,
Plaintiff,
vs.
JOSEPH DEMAURO,
Defendant.

Docket No. 94-M-173

****

TRANSCRIPT OF HEARING ON THE MERITS

DAY THREE

BEFORE

Honorable Walter L. Murphy
Presiding Justice
Rockingham County Superior Court
Brentwood, New Hampshire

NOVEMBER 17, 1999

APPEARANCES:

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Portsmouth, New Hampshire

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Lowell, Massachusetts

For the Defendant : Edwinna L. Vanderzanden, Esq.
Lawrence M. Edelman, Esq.
Hampton, New Hampshire

Bernard A. Dwork, Esq.
Boston, Massachusetts

Court Recorder : Renee O'Barton

* * *

[36] strategy and strategic deliberate process. They're two different issues.

THE COURT: I have made my order clear, I thought.

MR. TOBER: I thought so too. I'll proceed.

DIRECT EXAMINATION CONTINUED

BY MR. TOBER:

Q What did you understand, sir, the basis to be for changing the withdrawal figures and making them higher in this exhibit?

A In a phone conversation with Attorney Boumil we talked about making changes that would make these projections more conservative. We were taking our best attempt at keeping the – even though we didn't know what the withdrawals were, we were trying to keep them more consistent with what we believed they might have been. In effect, making Anne's numbers look less good.

Q Let me ask you a fairly basic question, Mr. Ouellet. As the withdrawal numbers went up, what happened to the projected values of the funds on hand? Did they go up or did they go down?

A They went down.

Q So as the withdrawal figures would go up, it would inure to the benefit of Mr. DeMauro?

A Yes.

* * *

[118] Q Part of the decision said, right here on the last page, sir, make sure I read it correctly, quote, "The trial court, however, may order" –

MS. VANDERZANDEN: Objection. Your Honor, I think that this is a –

THE COURT: What's the purpose –

MS. VANDERZANDEN: – legal argument and may be interesting between two attorneys, but –

THE COURT: What's the purpose of this?

MR. TOBER: It says that the trial court may order the defendant to sign the waivers to allow us to proceed.

THE COURT: I know that. How is he – how is he going to help you there? I know what the Supreme Court case said.

CROSS EXAMINATION CONTINUED

BY MR. TOBER:

Q How many waivers did you end up having to sign, Mr. McGee, to search out leads that might have taken us to some assets somewhere?

A I gave Attorney Boumil twenty. It was my understanding that he was going to be sending out the – based on the Court's order and the way it was written November 25th, it was my understanding Attorney Boumil was entitled to the authorizations and [119] would be sending them out. And so I gave him twenty. I would have signed more if he needed more.

Q And you understood that he then received those from you and sent them out with his letters to various financial institutions?

A Yes, that was my understanding of what happened.

Q And some of the responses were – from those institutions were copied to you, were they not?

A It was interesting. I – yes. Not some – there was Indocuez Agrico Bank involved in the dialogue – became involved in the dialogue, and I got correspondence from them. I believe Mr. DeMauro's daughter sent me a letter saying that she didn't have any business relationship with her father, and – which apparently was in response. And then there was Tepco, and Tepco led to some further action, and Tepco basically froze monies that Mr. DeMauro was entitled to, as well as Vista Energy.

Q Let me show you this letter from Geneva, Switzerland, dated March 15, 1999, and ask if you've seen it before?

(PAUSE)

A I did see that, yes.

Q Is that one of the letters that was characterized as, "interesting correspondence"?

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